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Supreme Court, U.S.
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No. 00-1273

In The

Supreme Court of the United States

STATE OF SOUTH DAKOTA,

Petitioner,

v.

SDDS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In three related decisions by the Court of Appeals for the Eighth Circuit decided in 1993, 1995, and 1996, it was determined (1) that a statewide referendum in South Dakota unconstitutionally prohibited the construction by the Respondent, SDDS, Inc. ("SDDS") of a large-scale interstate municipal solid waste disposal site, near Edgemont, South Dakota, and (2) that the State of South Dakota and named State officials were necessarily to be enjoined from relitigating in the state courts two specific issues that had been litigated and determined adversely to them in the federal litigation.

In the present case, the Petitioner, the State of South Dakota (the "State"), almost ten years after it expressly consented to appear in federal court to litigate the constitutionality of the referendum, and after having suffered three adverse judgments in the court of appeals, in which no claim of absolute Eleventh Amendment immunity was ever raised, is now attempting to assert such broad immunity, retroactively, by petitioning for review of the decision of the court of appeals which affirmed the district court's denial of the State's Fed.R.Civ.P. 60(b)(4) motion to vacate as void the judgments in the 1995 and 1996 cases.

QUESTIONS PRESENTED – Continued

Properly stated,[1] the questions thus presented are:

1. Whether the State is precluded from using Rule 60(b)(4) retroactively to challenge as void two final judgments of the court of appeals which were entered in cases in which the court possessed original jurisdiction, and in which the court expressly determined that the Eleventh Amendment did not bar its exercise of jurisdiction.

2. Whether the State, which in its answer to SDDS's § 1983 complaint, expressly admitted federal court jurisdiction and waived protection of the Eleventh Amendment as to the declaratory and prospective injunctive relief that was being sought against it, and then elected not to seek review by this Court of three final judgments entered against it by the court of appeals, should be deemed to have waived its Eleventh Amendment immunity.

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[1] The questions posed by the State are in the form of excessively circular arguments which assume the affirmative of what the petition seeks to prove and, in any event, as will appear below, they are more appropriately addressed in the reverse order of how they were stated.

PARTIES TO THE PROCEEDING

The Petition accurately identifies the parties.

Respondent SDDS, Inc., a South Dakota corporation, has neither a parent nor a subsidiary.

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STATEMENT OF THE CASE

An extended restatement of the case is necessitated both by the many inaccuracies and omissions in the Petitioner's[2] statement, as well as by the excessively argumentative style it employs. The State's effort to portray what occurred during the now nearly decade-long litigation in the federal courts below as entailing an "extraordinary departure" from the principles of the Eleventh Amendment is far from accurate. The State's statement of the case also omits to mention key facts whose disclosure changes the picture entirely.

The statement of the case offered by the State also employs a somewhat misleading characterization of the basis of the decision by the court of appeals as to which review is sought. A brief chronological history of what has occurred to this point, followed by a better understanding of the basis of the decision below, are therefore required in order to put the petition in proper perspective.

1. A Short History of the Litigation.

The State at first welcomed and encouraged SDDS's plan to develop a large rail-served municipal solid waste disposal site near Edgemont, in the arid and sparsely populated southwest corner of South Dakota. The project, named "Lonetree," had the financial and operational

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[2] For simplicity, the Petitioner, the State of South Dakota, will be referred to as the "State," and the Respondent, SDDS, Inc., as "SDDS."

backing of the Burlington Northern Railroad and Browning Ferris Industries, then the second largest waste disposal company in the United States. Eventually, however, a blatantly protectionist movement to "keep [Lonetree's] imported garbage out of South Dakota," *see SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 266 (8th Cir. 1995) ("*SDDS VI*"),[3] resulted in a statewide referendum that killed the project. "[T]he practical effect of the referendum was to prohibit the construction of the Lonetree facility." *In re SDDS, Inc.*, 97 F.3d 1030, 1039 (8th Cir. 1996).

SDDS responded by bringing a § 1983 suit against the State and named state officials in the United States District Court for the District of South Dakota seeking to

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[3] It has been the custom of the court of appeals and the parties to refer to the numerous federal and state decisions relating to Lonetree by sequentially roman-numbered short names beginning with "*SDDS I*," and so on. The practice was continued in the State's Petition and will be used here as well. For the information of the Court, the following is a partial list of some of the "SDDS" series, including cases which will be cited in this brief: *In the Matter of SDDS, Inc.*, 472 N.W.2d 502 (S.D. 1991); *SDDS, Inc. v. State of South Dakota*, 481 N.W.2D 270 (S.D. 1992) ("*SDDS II*"); *SDDS, Inc. v. State of South Dakota*, 994 F.2d 486 (8th Cir. 1993) ("*SDDS III*"); *SDDS, Inc. v. State of South Dakota*, 502 N.W.2d 852 (S.D. 1993); *In the Matter of the 1990 Renewal Application of SDDS, Inc.* 507 N.W.2d 702 (S.D. 1993) ("*SDDS IV*"); *SDDS, Inc. v. State of South Dakota*, 843 F.Supp. 546 (D.S.D. 1994) ("*SDDS V*"); *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263 (8th Cir. 1995) ("*SDDS VI*"); *In re SDDS, Inc.*, 97 F.3d 1030 (8th Cir. 1996) ("*SDDS VIII*"); *SDDS, Inc. v. State of South Dakota*, 569 N.W.2d 289 (S.D. 1997) ("*SDDS IX*"); *State of South Dakota v. SDDS, Inc.*, 523 U.S. 1118 (1998) ("*SDDS X*"); *SDDS, Inc. v. State of South Dakota*, 225 F.3d 970 (8th Cir. 2000) ("*SDDS XII*").

declare the referendum unconstitutional and enjoin its enforcement. The complaint alleged that the referendum violated SDDS's rights to due process and equal protection of law and unconstitutionally interfered with interstate commerce. That such an action was entertained against the State itself was hardly the "extraordinary departure" from Eleventh Amendment principles that the State now wants this Court to believe. What the State omits to mention is that the action was maintained against the State itself because at all times pertinent, the State itself expressly *consented* to this being so. Thus, in November of 1991, when the State filed its answer to SDDS's suit in the district court, the State expressly admitted that the court "has jurisdiction over the claims" set forth in the complaint.[4] Consistent with this express consent to jurisdiction over the claims for declaratory and prospective injunctive relief, the answer of the State went on to assert the Eleventh Amendment as an affirmative defense only " . . . to the extent [the complaint] can be construed to involve a claim for monetary relief . . . "[5]

Consistent with this deliberate and carefully expressed consent to jurisdiction, the State itself, in its own name, proceeded to wage a determined five-year battle to attempt to uphold the unconstitutional referendum that had stopped Lonetree and driven SDDS out of business. The State twice obtained summary judgments in the district court dismissing SDDS's complaint

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[4] State's answer to the complaint, ¶ 6, dated November 26, 1991, *SDDS, Inc. v. State of South Dakota*, No. 91-5121, United States District Court for the District of South Dakota.

[5] *Id.*, ¶ 24.

and then appeared, in its own name, in the court of appeals in unsuccessful attempts to uphold the district court's decisions favorable to it, all the while never even suggesting that the Eleventh Amendment was a bar to the civil rights action it was defending in the name of the State. The State did not dispute the Eighth Circuit's jurisdiction over the State in *SDDS III* when it reversed the district court's summary judgment dismissing the complaint on procedural grounds and remanded the case for "a full explication of SDDS's federal constitutional claims." *SDDS III*, 994 F.2d at 494. Nor did the State suggest it had any Eleventh Amendment protection after the court of appeals in *SDDS VI* reversed a second summary judgment in the State's favor and held that the referendum was unconstitutional. *SDDS VI*, 47 F.3d at 263. Nor did the State object on Eleventh Amendment grounds when it was ordered to pay SDDS's attorneys' fees, pursuant to 42 U.S.C. § 1988.

This calculated litigation strategy was consistent with the apparent practice of the State, whose Attorney General has broad authority under S.D. Codified Laws § 1-11-1(2) (Michie 2000) to defend "in any court" actions "in which the state may be a party or interested," to waive sovereign immunity in federal court declaratory judgment actions where important interests of the State or its citizens are at stake. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998), where, as here, the State filed an answer electing to waive Eleventh Amendment immunity so it could defend the interests of the state.[6] Such actions by the State, where it

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[6] State's Answer, ¶ V, *Yankton Sioux Tribe v. Southern Missouri Waste Management District v. State of South Dakota,*

has made free use of the federal courts whenever doing so suits its purposes, casts serious doubt on its present attempt to pose the "questions presented" for review as if, it is conveniently assumed, "state law barred state officials from waiving Eleventh Amendment immunity from suit in federal court." *Petition*, p.(I) (Questions Presented). If this is indeed the rule in South Dakota, it appears to be one honored more in the breach than the observance.

It appears that the State's purpose in consenting to jurisdiction in the present case was to attempt to uphold the "sacred constitutional rights of the citizens of South Dakota" to exercise the power of referendum.[7] Even after the State lost that crusade, and the referendum was struck down as unconstitutional in *SDDS VI*, the Eleventh Amendment was not raised by the State, and it accepted the judgment and paid the substantial award of attorneys' fees that was entered against it. The reason that there was not an Eleventh Amendment defense raised at any time while this initial five-year legal battle was being fought, SDDS suggests, was because the State knew full well that it had waived that defense years before at the outset of the case. If the State had truly believed then, as it professes to believe now, six years later, that the two

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United States District Court, District of South Dakota, No. 94-4217, filed Nov. 7, 1994.

[7] State's Petition for Rehearing and Suggestion for Rehearing En Banc, p. 8, dated April 23, 1993; *SDDS, Inc. v. State of South Dakota*, 8th Circuit Court of Appeals, Case No. 92-1898. *Compare, In re Baldwin-United Corporation*, 770 F.2d 328, 341 (2nd Cir. 1985) (State's immunity not implicated when it appears to vindicate the individual rights of its citizens).

judgments entered against it by the court of appeals were void, it surely would have challenged them, at the very latest, before the judgment in *SDDS VI* became final, by petitioning for rehearing and, if necessary, seeking review by this Court. The State did neither. Its failure to do so unmistakably confirms its original consent to jurisdiction and belies its present position.

It was not until the subsequent 1996 ancillary proceeding in *SDDS VIII*, which was brought to effectuate the judgment in *SDDS VI*,[8] that the State, for the first time, belatedly raised an Eleventh Amendment defense. Even then, however, the defense which it asserted was a limited one. The State did not at that time go so far as to contend, as it now does, that simply because it is a state, the federal courts lacked original jurisdiction under the Eleventh Amendment. Instead, and still fully consistent

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[8] The State boldly asserts that there was no continuing violation of federal law to be concerned about at that time. *Petition*, p. 4. But in rejecting the same argument then, the Eighth Circuit pointed out that, "almost from the moment the decision [in *SDDS VI*] was filed," the State had attempted to thwart it by, *inter alia*, proclaiming that SDDS "has, in essence, obtained a judgment that can do it no good. . . . [and] has in fact accomplished nothing more than obtaining 'the moral satisfaction of knowing that a federal court concluded [its] rights had been violated. . . . ' " *SDDS VIII*, 97 F.3d at 1036 n. 6. The State was also asserting that the Eighth Circuit's decision was not "binding precedent" in the state courts. *Id.* Rejecting this "unique interpretation of federalism," the Eighth Circuit observed that to permit such conduct to continue would "render[ ] our judgments largely nugatory and advisory," which would be "an intolerable result, and one which is not, we believe, mandated by the Eleventh Amendment." *SDDS VIII*, 97 F.3d 1035-36 and n. 6.

with its original partial waiver of the Eleventh Amendment, the State's argument in *SDDS VIII* was simply that the injunctive relief that was being sought went too far. The State contended that an injunction which would prohibit it from relitigating in state court two key issues that had already been litigated and determined against it in *SDDS VI*, could indirectly lead to establishing the State's liability in the state court takings case. The argument was that this went beyond the type of prospective injunctive relief which the State, at least tacitly, continued to concede would be proper in this case. *SDDS VIII*, 97 F.3d at 1036 n. 7. But when the Eighth Circuit rejected this limited Eleventh Amendment defense and directed the entry of an injunction to effectuate the prior judgment in *SDDS VI*, *see SDDS VIII*, 97 F.3d at 1035-36, 1041-42, the State again acquiesced in the judgment entered against it and paid a second award of attorneys' fees. Again, if the State had truly believed then, as it professes to believe now, five years later, that the succession of three judgments entered against it by the court of appeals were void, it surely would have challenged them, at the very latest, before the judgment in *SDDS VIII* became final, by petitioning for review by this Court. Its failure to do so for the third time unmistakably confirmed its original consent to jurisdiction and further belies its present position.

Even after the State then sought what it perhaps thought would be safe harbor in its own courts, it still did not attempt to assert the Eleventh Amendment as a defense to the validity of the federal judgments. Thus, when the South Dakota Supreme Court held in *SDDS IX*, 569 N.W.2d 289, that the unconstitutional referendum had effected a taking of SDDS's property and on that basis

reversed the state trial court's summary judgment dismissing SDDS's state court takings suit and remanded the case with instructions to hold a jury trial to determine damages, the State still did not suggest that the federal judgments, which the South Dakota Supreme Court had considered itself obliged to honor, were void.

The State's present effort to make it appear that it "declined to file a supplemental brief requested by the South Dakota Supreme Court or to present any oral argument regarding the impact of the federal injunction upon the state takings action," because it was threatened by SDDS with contempt if it did so, *Petition* at 4, is not an accurate rendition of what actually occurred. The facts are that on December 23, 1996, the South Dakota Supreme Court ordered the parties in that case to file supplemental briefs "addressing the impact" of the Eighth Circuit's decision on the issues on appeal. Instead of responding as directed, the State, on February 26, 1997, unilaterally advised the state supreme court that it considered itself "constrain[ed]" by the federal mandate and therefore "must respectfully decline from filing additional briefing regarding this matter."[9] This, of course, was not so, because while the State had been enjoined from relitigating two specific issues, it was certainly free to advise the state supreme court of anything else that might be pertinent, including any argument that the State might then have had that the judgments of the Eighth Circuit were void on Eleventh Amendment grounds.

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[9] *Appellees' Supplemental Statement*, p. 2, dated February 26, 1997, S.D. Supreme Court, No. 19555.

But for the State to assert now that it said nothing then because it was threatened with contempt, is not true. It was not until much later, after the State had already announced its intention not to submit a brief, that SDDS did suggest that the State should withdraw its original brief in the state supreme court because that brief contained virtually nothing except arguments on the two issues which the Eighth Circuit had directed that the State not relitigate. That the State thus elected to stand mute before the South Dakota Supreme Court only once again underscores its understanding, at least at that time, that it had effectively consented to federal jurisdiction over it.

Although the State did petition the South Dakota Supreme Court for rehearing in that case, it did not, even then, suggest that the judgments entered in the federal litigation, which the state court had accepted as controlling, were void because of the Eleventh Amendment. It was not until the State hired new lawyers and then proceeded to petition this Court, in No. 97-1378, for a writ of certiorari to review the South Dakota Supreme Court's 1997 decision, that the State, for the first time, advanced the contention that the Eighth Circuit had lacked original jurisdiction to enter the judgments in *SDDS VI* and *SDDS VIII*. This Court denied the State's petition for a writ of certiorari in *SDDS X*, 523 U.S. 1118 (1998). Despite the State's present efforts to make it appear that its current petition for a writ of certiorari stands on different footing than the first, a comparison of the two petitions will show that substantially the same Eleventh Amendment arguments that are now being advanced, alleging that the Eighth Circuit lacked jurisdiction to enter the judgments

in question, were also asserted as the basis for granting certiorari in the prior petition in No. 97-1378.

2. The Decision of the Court of Appeals.

It was against this protracted history of the State's consent to suit in the federal courts for the avowed purpose of attempting to uphold the constitutionality of the referendum that the Eighth Circuit entered its most recent decision which the State is now petitioning this Court to review. The State refers to this as a "brief" decision, apparently intending to suggest that brevity somehow connotes lack of substance. But nothing could be further from the truth. The language of this latest decision of the court of appeals may indeed be somewhat terse, but it has to be read in the context of the three lengthy opinions that preceded it. When this is done, the mischaracterizations of the court's holdings which appear in the State's petition become obvious.

For example, contrary to the State's assertion that the court of appeals held that the state had "surrendered its Eleventh Amendment immunity simply by litigating the merits of the claims against it . . . ," *Petition* at 2, it is clear that the court was in fact looking at much more. What the Eighth Circuit was no doubt referring to when it observed that "[a] state may . . . waive its Eleventh Amendment immunity through its conduct. . . . [and][c]ourts have inferred a waiver when the State has made a general appearance in federal court and defended a lawsuit on

the merits. . . . [citation omitted],"[10] *State's App.*, p. 4a, was the *totality* of the State's conduct in the present case, which, as seen above, began with an express waiver and was followed by acquiescence in three adverse final judgments as to which no further review was sought. Thus, after quoting from this Court's opinion in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 389 (1998), "that the Eleventh Amendment . . . does not automatically destroy original jurisdiction. . . . [but] [r]ather grants the State a legal power to assert a sovereign immunity defense should it choose to do so," the Eighth Circuit concluded:

> In the present case, the State for many years actively and vigorously litigated the merits of SDDS's claims in federal court, never once raising an Eleventh Amendment immunity defense until after the mandates had been issued and our decisions in *SDDS VI* and *SDDS VIII* were final. In light of the State's conduct, it would appear that the State has waived any sovereign immunity defense it may have had to the claims addressed in *SDDS VI* and *SDDS VIII*.

State's App., p. 4a.

The Eighth Circuit's treatment of the waiver issue on the facts before it was actually the secondary, or alternative, basis for its decision. Initially, the court of appeals held that the State could not use Fed.R.Civ.P. 60(b)(4) to attack the final

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[10] The case cited in the Eighth Circuit's opinion, *Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992), *cert. denied*, 506 U.S. 1013 (1992), also involved more than a state just appearing and litigating. In that case, as here, the state had not only defended a suit, but had,"[i]n sum, . . . acted . . . of and for the benefit of itself." *Id.*, 964 F.2d at 858.

unappealed judgments in *SDDS VI* and *SDDS VIII*, and that those judgments were not void because the Eleventh Amendment "does not automatically destroy original jurisdiction." [quoting *Schacht*, 524 U.S. at 389] *State App.* at 4a. Since this Court could affirm the court of appeals on this narrow ground alone, and therefore choose not to reach the constitutional question posed by the court of appeal's alternative Eleventh Amendment waiver holding, the propriety of the Rule 60(b)(4) holding will be addressed first in the discussion that follows.

REASONS FOR DENYING THE WRIT

This case does not meet any of this Court's announced criteria for granting review of a decision of a court of appeals. The purported conflicts which the State portrays between the present decision of the Eighth Circuit and decisions of other circuits, and with controlling decisions of this Court, are an illusion at best. The cases upon which the State relies to posit the existence of such a conflict, which are exemplified by the Sixth Circuit's 1974 decision in *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974), have either been impliedly overruled or have lost all weight as authority by reason of intervening decisions of this Court, as well as by later decisions by the same courts which entered them, and are not an adequate basis for seeking certiorari. These illusory conflicts will be more fully discussed in the following sections of this response.

The State's further effort to make it appear that, if the Eighth Circuit's decision is allowed to stand, it will "undermine fundamental Eleventh Amendment doctrine, detract from 'the dignity and respect afforded a State, which the [Eleventh Amendment] immunity is designed to protect' [quoting *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268 (1997)], and create uncertainty in areas of great practical importance," *Petition* at 7, is unsupportable. Rather than detracting from fundamental Eleventh Amendment doctrine, the decision of the Eighth Circuit echoes it. The State's position to the contrary, which underlies *all* of its arguments here, is that the several final judgments which were entered against it in the Eighth Circuit can now be collaterally attacked because, the State supposes, they are void for want of subject matter jurisdiction. In this regard, however, it is the State itself which seeks to roll back more than two centuries of Eleventh Amendment jurisprudence, dating back at least to *Clark v. Barnard*, 108 U.S. 436, 447 (1883), and which was recently reaffirmed by this Court in the *Coeur d'Alene Tribe* and *Schacht* cases, whose consistent teaching has been that the Eleventh Amendment does not automatically deprive a federal court of original jurisdiction and, unlike subject matter jurisdiction, is an assertable defense, or privilege, a state can waive if it chooses.

The State's contention that allowing the decision to stand will detract from "the dignity and respect" afforded a state is, under the facts of this case, at odds with the Bill of Rights.

> [T]he use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of,

> and one which does not affect, the State in its sovereign or governmental capacity.

Ex Parte Young, 209 U.S. 123, 159 (1908).

To hold otherwise would in this case only denigrate the "dignity and respect afforded a State," which *Coeur d'Alene* references, by allowing a state to play games with the Eleventh Amendment and use it to manipulate federal courts and litigants by, first, consenting to suit, then litigating to achieve a desired result, and finally, after the litigation is done and the judgments are final, withdrawing its consent, or not, depending on its satisfaction with the outcome. This is not the sort of gamesmanship the Constitution envisions. *See Schacht*, 524 U.S. at 394 (Kennedy, J., concurring) (expressing concern about the "impropriety" of allowing a "belated assertion of the Eleventh Amendment bar . . . [that] would allow states to proceed to judgment without facing any real risk of adverse consequences").

Finally, this Court should not allow itself to be misled by the State about what is actually at issue in the present case. The State's transparent design here, which is plainly evidenced in its retroactive attempt to nullify the jurisdiction of the Eighth Circuit, is to close the doors of its own courthouses to SDDS's efforts to obtain just compensation under the Takings Clause for the State's unconstitutional confiscation of its rights to develop the Lonetree interstate waste disposal facility.[11] But the Fifth Amendment's Takings Clause is not a "poor relation" of other parts of the

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[11] In connection with the cross-appeals by SDDS and the State which are currently pending in the South Dakota Supreme Court in No. 21428, which grow out of the state trial court's

Constitution. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). This Court should not sanction such a misuse of the Eleventh Amendment to nullify the Bill of Rights. The State had ample opportunities in this protracted litigation to assert an Eleventh Amendment immunity and should not now be allowed to escape whatever consequences may flow under the Constitution from its own repeated choices not to do so.

I. THE DECISIONS OF THE EIGHTH CIRCUIT ARE NOT SUBJECT TO ATTACK UNDER FED.R.CIV.P. (60)(b)(4)

The basic assumption that underlies all of the arguments contained in the State's petition is that the decisions in *SDDS VI* and *SDDS VIII* are "void" for want of subject matter jurisdiction, and that they can therefore be successfully attacked under Rule 60(b)(4). But this is simply wrong. This Court has repeatedly rejected the view that the Eleventh Amendment operates to deprive a federal court of subject matter jurisdiction to determine a case or controversy otherwise properly before it.

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nullification of the jury verdict in SDDS's favor on its Fifth Amendment takings claim, the State is openly urging the South Dakota Supreme Court to disregard *SDDS VI* and *SDDS VIII* as being void. Further, the State is urging the South Dakota Supreme Court to hold that SDDS's Fifth Amendment remedy for the damages inflicted upon it by the unconstitutional referendum is not under the self-executing provisions of the Takings Clause, but is instead governed solely by the Due Process Clause (as to which the State of course claims it cannot be sued, even in its own courts, because it is not a "person" within the meaning of 42 U.S.C. § 1983).

> Rather, a State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it. The Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaiveable limit on the federal judiciary's subject-matter jurisdiction.

Coeur d'Alene Tribe, 521 U.S. at 267.

The Court's unanimous decision a year later in *Schacht* made it even more plain that the Eleventh Amendment does not automatically deprive a federal court of subject matter jurisdiction, such as would render a judgment against a state *void* within the meaning of Rule 60(b)(4).

> The Eleventh Amendment, however, does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. [citations omitted]. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it. [citation omitted].

Schacht, 524 U.S. at 389.

The unavailability of relief under Rule 60(b)(4) is further foreclosed in the present case as a result of the State's considered choice not to appeal the decisions it now seeks retrospectively to attack, especially the 1996 decision in *SDDS VIII* which rejected the limited Eleventh Amendment defense that the State chose to advance at that time. "Petitioner made a considered choice not to appeal . . . There must be an end to litigation someday,

and free, calculated, deliberate choices are not to be relieved from." *Ackerman v. United States*, 340 U.S. 193, 198 (1950). *See also Federated Dep't Stores v. Moitie*, 452 U.S. 394 (1981).

The State attempts to escape the consequences of its failure to seek timely certiorari review of the decisions in *SDDS VI* and *SDDS VIII* by suggesting that requiring a petition for certiorari in such a situation, rather than allowing later resort to Rule 60(b)(4) to obtain relief, is "insupportable" and "inconsistent with the holdings of other courts of appeal." *Petition* at 8. What the State overlooks, however, is that the Eighth Circuit's determination of its jurisdiction to act in *SDDS VIII*, which rejected the State's Eleventh Amendment challenge, is now conclusive.

> But that was a question which the circuit court of the United States was competent to determine in the first instance. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error or appeal to this court.

Stoll v. Gottlieb, 305 U.S. 165, 175 (1938).

"The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940). "It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal." *Insurance Corp. of Ireland v. Compagnie des Bauxites de*

Guinee, 456 U.S. 694, 702 n. 9 (1982). "It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll*, 305 U.S. at 172. Rather than being "unsupportable," therefore, the Eighth Circuit's holding that the State is now conclusively bound by the unappealed decisions in *SDDS VI* and *SDDS VIII* is fully in accord with the established law.

The State's contention that the Eighth Circuit's decision in this case is inconsistent with decisions of other courts of appeal *is* unsupportable. The "conflicts" which the State is attempting to portray are illusory. Of the three cases cited by the State in support of that proposition, only *Jordan v. Gilligan*, 500 F.2d 701 (6th Cir. 1974) implicated Eleventh Amendment immunity. *Jordan* itself is no longer good law and has not been since *Hutto v. Finney*, 437 U.S. 678 (1978) and *Missouri v. Jenkins*, 491 U.S. 274 (1989) established, contrary to the ultimate holding in *Jordan*, that ancillary relief in the form of an award of attorneys' fees against a state under 42 U.S.C. § 1988 does not violate the Eleventh Amendment. Moreover, what was left of *Jordan*, which consisted of the notion that the Eleventh Amendment trumps subject matter jurisdiction, was once and for all rejected by this Court in *Schacht*. Significantly, in *Kovacevich v. Kent State University*, 224 F.3d 806 (6th Cir. 2000), the Sixth Circuit acknowledged that this Court's decision in *Schacht* had overruled its earlier holdings that the Eleventh Amendment was an absolute bar to the federal court's exercise of jurisdiction over a state. *Jordan* has thus been impliedly overruled and is no longer valid precedent, even in the circuit that decided it.

Contrary to the unfocused picture the State attempts to project, the circuits have been uniformly firm in adhering to the principle that Rule 60(b) cannot be used as a substitute for direct review of a judgment, and that subsection (4) only applies in instances involving " . . . a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority." *Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir. 1980). *See, to the same effect, United States v. Tittjung*, 235 F.3d 330, 335 (7th Cir. 2000) ("To be egregious, and thus void under Rule 60(b)(4), the error must involve a clear usurpation of judicial power, where the court wrongfully extends its jurisdiction beyond the scope of its authority.") *Gschwind v. Cessna Aircraft Company*, 232 F.3d 1342 (10th Cir. 2000) (there must be no arguable basis on which the court could have rested a finding that it had jurisdiction); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2nd Cir. 1986) (Rule 60(b)(4) applies only where there is "a clear usurpation of power by a district court, and not an error of law in determining whether it has jurisdiction."); and *United States v. One Rural Lot No. 10,356*, 238 F.3d 76, 78 (1st Cir. 2001) (A judgment is not void simply because it is or may have been erroneous. It is void only if from its inception, it was a legal nullity).

In the final analysis, since as *Schacht* and other pertinent decisions of this Court have by now made plain the Eleventh Amendment does not automatically deprive the federal courts of original jurisdiction over a state, it follows that the Eighth Circuit's exercise of jurisdiction over the State in the two decisions now being attacked was not the egregious usurpation of power required to render a judgment void within the meaning of Rule 60(b)(4).

II. THE STATE HAS IN ANY EVENT EFFECTIVELY WAIVED ITS IMMUNITY IN THE PRESENT CASE

The Eleventh Amendment was not designed to protect a state which, as the State did in the present case, voluntarily appears and participates on the merits of a case in federal court. The bar of the Eleventh Amendment is not absolute and, like any other privilege, may be waived. *Clark v. Barnard,* 108 U.S. 436, 448 (1883) (the State "made itself a party" by voluntarily appearing and pursuing a position in its own interest). "None of the prohibitions . . . of the [Eleventh] amendment . . . relate to the power of a Federal court to administer relief in causes where jurisdiction, . . . has been acquired as a result of voluntary action of the state in submitting its rights to judicial determination." *Gunter v. Atlantic Coast Line RR Co,* 200 U.S. 273, 292 (1906). *See also, Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 276 (1959) (The Eleventh Amendment is "an immunity which a State may waive at its pleasure . . . "). In short, "the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense." *Schacht,* 524 U.S. at 389. The facts discussed at the beginning of this response clearly establish such a waiver by the State in the present case.

The State argues that its mere voluntary participation in the case was not enough to effect a waiver, however, and at pages 9-10 of the petition it points to the line of cases in which this Court has accorded the states great latitude in raising the defense "at any point *of the proceedings." Florida Dep't of State v. Treasure Salvors,* 458 U.S. 670,

683, n. 18 (1982) (emphasis added). In *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 467 (1945), it was held that raising the defense for the first time in this Court, in proceedings on certiorari, was "in time." This long leash has its limit, however, and in no case of which we are aware has this Court allowed it to stretch beyond the conclusion of the "proceedings" in question. To allow it to do so in the present case would not only do violence to the doctrine of finality, discussed *supra*, upon which so much of our legal system depends, but would grant the State a license to treat final judgments of a federal court as merely advisory and subject to revision at any time at the whim of the State. *See Vecchione v. Wohlgemuth*, 558 F.2d 150, 158-59 (3rd Cir. 1977), *cert. denied*, 434 U.S. 943 (1977) (holding that while Eleventh Amendment immunity could have been asserted for the first time on appeal, where no appeal is taken a participating state's waiver "must be deemed to have become final at the latest when the resulting judgment has become final").

The State's final attempt to escape the consequences of its consensual participation in the protracted litigation in federal court, and its deliberate choice not to seek review of any of the final judgments that were entered against it, involves its assertion that a South Dakota statute, S.D. Codified Laws § 3-21-10, prohibited its attorneys from waiving Eleventh Amendment immunity. Laying aside for now the somewhat ambiguous language of § 3-21-10 and the problem of reconciling it with another South Dakota statute, S.D. Codified Laws § 1-11-1(2), which makes it one of the "duties" of the State's attorney general "to appear for the state and . . . defend, in any court . . . , any cause . . . in which the state may be a party

or interested," and also laying aside at this time the previously discussed practice of South Dakota's attorney general to ignore S.D. Codified Laws § 3-21-10 when it is deemed expedient to do so, the fact remains that this statutory defense yields to federal law.

Such statutes, whether of South Dakota or other states, which are either designed to or have the practical effect of insulating a state or its officials from civil rights suits are preempted by 42 U.S.C. § 1983. *See, Felder v. Casey*, 487 U.S. 131, 139 (1988) (" . . . [A] state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted . . . "). Just as in *Felder* where the Wisconsin notice-of-claim requirements of Wisconsin's statute failed to insulate Wisconsin from liability in its own courts for claims brought under the preemptive provisions of § 1983, so have courts in the Eighth Circuit held the same § 1983 preemption applies to state attempts to curtail federal court jurisdiction and to similar state statutes claiming to render its officials immune from § 1983 claims. Indeed, the identical South Dakota statute under which the State claims it is immune here was held to have been preempted in *Webb v. Lawrence County*, 950 F. Supp. 960, 967 (D.S.D. 1996), *aff'd*, 144 F.3d 1131 (8th Cir. 1998) ("This Court has held that [the immunity provided by S.D. Codified Laws § 3-21-10 is] preempted when the underlying claim is brought pursuant to 42 U.S.C. § 1983 for an intentional violation of personal civil rights.").[12] The Eighth Circuit has itself recognized § 1983's preemptive effect on conflicting state laws in *Hankins*. ("We thus

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[12] SDDS's cause against the State, for vindication of SDDS's civil rights to engage in interstate commerce, is unquestionably a § 1983 suit. *Dennis v. Higgins*, 498 U.S. 439 (1991).

conclude that § 1983 preempts the Missouri [statute] as it is applied in this case.") *Id.*, 964 F.2d at 861.[13]

This accords with decisions of this Court. *See Howlett v. Rose*, 496 U.S. 356, 376-377 (1990), quoting from *Martinez v. California*, 444 U.S. 277, 284 n. 8 (1980).

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.

Just as it omitted to raise Eleventh Amendment immunity until after *SDDS VI* and *SDDS VIII* were each final and unappealed, the State similarly never raised the claimed bar of S.D. Codified Laws § 3-21-10 in those

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[13] The State argued before the Eighth Circuit that other Eighth Circuit cases vindicating application of such statutes, specifically *Fromm v. Comm'n*, 220 F.3d 887 (8th Cir. 2000), *petition for cert.* filed Feb. 27, 2001, and *Santee Sioux Tribe of Nebraska v. Nebraska*, 121 F.3d 427 (8th Cir. 1997), irreconcilably conflicted with *Webb* and *Hankins*. However, neither *Fromm* nor *Santee Sioux* was brought under § 1983. Nor were the cases of this Court on which the State relies in its present Petition, *Ford Motor Co. v. Dep't of the Treasury*, 323 U.S. 459 (1945), and *Sosna v. Iowa*, 419 U.S. 393 (1975), cases brought under § 1983. A contrary ruling would perversely insulate state actors, courtesy of state statutory interdiction, from liability for the federal civil rights violations § 1983 was specifically designed by Congress to address in 1871.

cases. The State should accordingly not be heard to complain, as it may, that it is not a "person" within the meaning of § 1983, for it has as surely waived the right to make that contention as it is precluded at this late date from asserting an Eleventh Amendment immunity. With words directly applicable here, the Third Circuit, in *Mitchell v. Comm'n*, 12 F.3d 406 (3rd Cir. 1993), after rejecting a claim by a state agency that it was immune under the Eleventh Amendment from federal court jurisdiction and that it was not a "person" for purposes of § 1983, put that argument to rest:

> The Commission's alternative defense that it is not a "person" as that term is used in 42 U.S.C. Sec. 1983 can fare no better, of course, than its eleventh amendment one. The eleventh amendment is quasi-jurisdictional; the alternative statutory defense is non-jurisdictional and should have been raised in a motion under Fed.R.Civ.P. 12(b)(6). It is well settled that a defense of failure to state a claim cannot be asserted following a failure to appeal a final judgment. [Citations omitted].

Id., at 12 F.3d 409.

Finally, SDDS suggests that the present petition is not the proper vehicle in which to accept Justice Kennedy's implied invitation in his concurring opinion in *Schact* that it may have to lie with "some later case," *id.*, 524 U.S. at 394, to test whether a state's mere appearance in, and litigation of, a federal court action otherwise subject to a claim of Eleventh Amendment immunity constitutes, as with *in personam* jurisdiction, a waiver of the right to claim such immunity at a later point in the litigation process. While the circuit court decision here may partake

of these considerations, it does so only in passing, because lying at the heart of the dispute here is instead whether three final decisions of the Eighth Circuit entered literally years ago are void for lack of subject matter jurisdiction so as to be subject to attack under Rule 60(b)(4), Fed. R. Civ. P. Given the clear holdings of this Court in *Coeur d'Alene* and *Schact* that Eleventh Amendment immunity is not equivalent to an absence of subject matter jurisdiction, SDDS submits that on this record the affirmance of these three unappealed final decisions is compelled by this Court's holdings in *Coeur d'Alene* and *Schact*.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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